

No. 9826.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GIN SOON GING,

Appellant,

vs.

WM. A. CARMICHAEL, District Director of Immigration
and Naturalization,

Appellee.

BRIEF FOR APPELLANT.

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Pleadings.

This is an appeal from an order of the District Court dismissing the writ of habeas corpus previously issued upon the application of the appellant. The petition was made by appellant's father, Gin Ting, on September 25th, 1940 [Tr. of R. pp. 2-7], the writ was issued and served on the same day [Tr. of R. p. 8], the appellee's return to the writ attaching the Immigration records involved was filed on October 7, 1940 [Tr. of R. pp. 9-10], and traverse to the return was submitted in the appellant's behalf on October 10th, 1940 [Tr. of R. pp. 11-12]. Issue was thus joined.

Jurisdictional Statement.

Jurisdiction of the court below to review the proceedings of the Immigration Service was invoked by the appellant on the ground that he was denied a fair hearing of his case under the provisions of 28 U. S. C., Section 451

(R. S., Section 751). The present appeal is authorized by the provisions of 28 U. S. C., Section 225-a (Jud. Code, 128, as amended).

Facts of the Case.

Gin Soon Ging, the appellant, was a 14-year-old boy of the Chinese race who came to the port of San Pedro, California on June 30th, 1940 and applied to the Immigration authorities there for admission as a natural born American citizen by virtue of the provisions of Section 1993 of the Revised Statutes. He left China to join his American-born father, Gin Ting, in this country. As evidence of his citizenship, Gin Ting presented United States Citizen's Certificate of Identity No. 5888 issued to him by the Commissioner of Immigration and Naturalization at San Francisco, California on November 7th, 1911. Appellant claimed that he was born to the said Gin Ting and wife on May 25th, 1926 in China, and that he was therefore entitled to admission as the foreign-born son of a native-born American citizen under the aforesaid statute.

Appellant's application was heard by a board of special inquiry on July 9th, 1940. His alleged father, Gin Ting, and clansman, Gin Wing Fun, appeared before the board to testify in his behalf. After hearing the testimony of the appellant and his two witnesses on matters concerning his ancestors, parents, brothers and other relatives, the detailed description of his Chinese home, ancestral village and schooling as well as many other matters and events which the board believed the appellant and his alleged father should have common knowledge by virtue of their relationship to each other, no discrepancies or inconsistent statements were developed. The board nevertheless, denied the appellant the right of admission and based its exclud-

ing decision solely on the ground that there were some discrepancies between the testimony of his alleged father and Gin Hong Goon in certain Immigration proceedings had in 1931 and 1937 to which the appellant was not even a party. The board was also in receipt of an anonymous letter saying that the appellant was Gin Ting's grandson and not his son, so an additional finding to that effect was made for the appellant's exclusion.

Appeal was then taken to the Immigration Board of Review in Washington, D. C., that the hearing was unfair and findings were not supported by facts. The appellate board, however, dismissed the appeal and confirmed the excluding order of the trial board. Thereupon, a writ of habeas corpus was applied for by the appellant's father in his behalf to obtain judicial review of the same. This is an appeal from the order of the court below dismissing the writ.

Specifications of Error.

The court below held that the board of special inquiry did not commit a manifest abuse of the power and discretion conferred upon it and that the excluding decision rendered against the appellant was not reached unfairly or arbitrarily [Tr. of R. pp. 12-14]. Appellant believes the court below was in error. Specifications of error are expressed in his statement of points for appeal filed on April 25th, 1941 [Tr. of R. pp. 16-18].

The question at issue may therefore be succinctly stated as follows: *Was the hearing accorded the appellant by the Immigration Authorities arbitrary and unfair?* Appellant contends that he was denied the fair hearing to which he was entitled.

ARGUMENT.

I.

The Board of Special Inquiry Committed a Manifest Abuse of the Power and Discretion Conferred Upon It by Arbitrarily Rejecting the Uncontradicted Testimony of the Appellant's Alleged Father Concerning His Relationship to the Appellant.

There was not a single discrepancy developed between the testimony of the appellant and his alleged father before the board of special inquiry. The examination accorded them touched upon every detail pertaining to their ancestral history, family, relatives, home, village, and hundreds of various collateral events which took place during their lives. The pedigree reputation was also corroborated by the testimony of their clansman Gin Wing Fun. The board, however, arbitrarily brought into the picture certain discrepancies developed in 1931 and 1937 between the testimony given by the appellant's father and appellant's alleged brother, Gin Hung Goon, who failed to gain admission to this country, and sought thereby to discredit the appellant's father's present testimony.

Of course, the law's method of ascertaining the credibility of witnesses is nothing new and has been known for centuries. Aside from the appearance of the witness, his demeanor on the stand, the reasonableness of his testimony, and his character, he can only be impeached by evidence of contradictory statements made out of court or in another tribunal on material matters. *Gung You v.*

Nagle (C.C.A. 9th), 34 Fed. (2d) 848, 852. The matter material to appellant's case is the relationship between the appellant and his alleged father. Not only was there no disclaimer of such parentage by appellant's father in the 1931 and 1937 proceedings, the official records of those proceedings are replete with antecedent testimony by him concerning the birth and existence of the appellant in his family and home in China. There was, therefore, no valid ground for the board to reject either the present or previous testimony of the appellant's father pertaining to his relationship to the appellant. To do so is an unwarranted abuse of power and discretion.

On appeal to the appellate board in Washington, D. C., the language used in the decision rendered on September 18th, 1940, reads as follows:

"The Board of Special Inquiry appears to have found the appellant's alleged father to be discredited as a witness by reason of the record fact that in 1931 and again in 1937 he testified in support of the claim of one Gin Hung Quon to be his son and, therefore, entitled to admission as a citizen, which claim was not found to be established with the result that the said Gin Hung Quon was returned to China at the conclusion of those two proceedings. *Reference to the records of those two applications, however, fails to show that fraud was proved or even alleged in either of them. Thus, it is not believed that the Board of Special Inquiry is warranted in finding the alleged father discredited by reason of his testifying in those proceedings.*" (Emphasis ours.)

II.

The Board of Special Inquiry Was Arbitrary and Unfair in Relying on the Questionable Contents of an Anonymous Letter to Base an Order of Exclusion Because the Rights and Privileges of Citizenship Cannot Be So Lightly Denied the Appellant.

Shortly previous to the supplementary hearing held on July 23rd, 1940, the board of special inquiry was in receipt of an anonymous communication to the effect that the appellant was Gin Ting's grandson and not his son as claimed. During the course of the hearing, appellant's father produced a family group photograph taken in China many years ago as additional evidence of relationship which was overlooked in the first hearing and in which appeared the appellant, his mother Lee Shee, his younger brother Gin Soon Pang, his older brother Gin Hung Goon and the latter's wife Wong Shee. After the unexpected introduction of this photograph, the board showed it to the appellant who without any hesitation identified and named each and every person therein. The board, however, paid lip service to the law as laid down by our Supreme Court in *Kwock Jan Fat v. White*, 253 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010, by stating that the anonymous information was given "no credence" because of its source, came out with the wild stab in the dark by finding that the said photograph appeared to be that of a "father and mother and two children and a grandmother", which alleged opinion if it were based on fact, would furnish support to the allegation contained in the anonymous letter, and, of course, would make the appellant's mother his grandmother. This remarkable finding of the board may be characterized solely as a prejudicial effort to give full weight and credence to the anonymous infor-

mation whipsawing the evidence around to suit the convenience of the suspicion of the members of the board by making the wish the father to the thought. Even the Immigration Board of Appeals had to acknowledge the invalidity of such a ground on September 18, 1940, as follows:

“Also, it appears that while the Board of Special Inquiry has given no credence to anonymous information that this appellant is a grandson instead of a son of his alleged father; yet, *that Board appears to have indirectly given some weight to that information in finding that the group photograph presented ‘would appear to be the photograph of father and two children and a grandmother’, which would accord with the anonymous information*, instead of being, as the alleged father and appellant testify, a picture of the appellant and his mother, and his older brother and the latter’s wife, and his younger brother.” (Emphasis ours.)

Under the same circumstances, this Honorable Court held in the case of *Chew Hoy Quong v. White* (C.C.A. 9th), 249 Fed. 869, 870, as follows:

“Aside from that, we hold that the fact that the immigration authorities received a confidential communication concerning the applicant’s right to admission, upon which they acted, and which was forwarded to the Department of Labor for its consideration, was *sufficient to constitute the hearing unfair*. However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, *there clearly is no warrant for basing decision, in whole or in part, on*

confidential communication, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received." (Emphasis ours.)

See, also:

Wong Gook Chun v. Proctor (C.C.A. 9th), 84 Fed. (2d) 763.

III.

The Board of Special Inquiry Acted Most Arbitrarily and Unfairly by Disregarding Direct and Material Evidence on the Issue of Relationship Between the Appellant and His Alleged Father in Order to Render Its Decision of Exclusion.

By reason of the fact that Gin Ting had not been back to China since 1927 when the appellant was an infant two years old, the board of special inquiry disregarded the testimony in support of the claimed relationship. This Honorable Court in the case of *Gung You v. Nagle*, 34 Fed. (2d) 848, 852, said:

"Relationship is not usually proved by physical facts, and never is where the mother does not testify, but by pedigree reputation in the family, and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evi-

dence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. *Such evidence is not collateral evidence; it is direct and material evidence on the issue.*" (Emphasis ours.)

The mere fact that the appellant's father has not seen the appellant in person since the latter was an infant therefore could not reasonably discredit his father's testimony on his conduct toward the appellant, or testimony of others on the pedigree reputation in their family. In 22 Corpus Juris 172, Section 103 g, the following passage is found, viz.:

"Relationship. The rule admitting declarations concerning pedigree applies to a question of relationship; in addition to which a person may testify as to his relationship to another person, especially where the statement is based on his own knowledge; and parentage may be proved by general reputation."

And in 22 Corpus Juris 173, Section 106 (3), the following is noted:

"Identity. In the absence of direct evidence by the conclusion of witnesses, or by inspection of the court and jury, *identity may be established circumstantially not only by proving extrinsic facts which render its existence probable, but by proof of indicative manifestations*, such as declarations showing peculiar knowledge, or by conduct, such as residence in a particular country, state, or other place, or service in the army at a certain time. *A family tradition may assist in identification, and hearsay statements in the nature of declarations regarding pedigree are competent for the same purpose.*" (Emphasis ours.)

It is readily seen that the law does not require physical identification of the appellant by his alleged father, who may or may not be able to recognize him in person as they have been separated from each other ever since the appellant was an infant, although in this particular case, the father was able to do so because of having kept in constant touch with his family during all these years and of having received pictures of the appellant from the boy's mother from time to time, one of which was contained in the family group photograph used as an exhibit herein and another attached to the affidavit of relationship. It was therefore arbitrary and unfair for the Immigration officials to disregard this unimpeached, direct, and material testimony given by the appellant's father on the relationship issue. This flagrant disregard of the principles of justice constituted a denial of due process of law.

In the court below, the appellee cited in this connection, the Massachusetts case of *Chung Fong Kwon v. Tillinghast*, 35 Fed. (2d) 398, and *Tillinghast v. Chin King*, 38 Fed. (2d) 5, neither of which has any application to the case at bar. The first one, a District Court case, refers to the failure of the applicant as a native born to produce a birth certificate showing his birth *in this country* where recording of such vital statistics is required by statute. There is no such a requirement in China. The second case refers to the testimony of the identifying witness who has not seen the applicant since he was five and a half years old and not to the testimony of the applicant's father. The identifying witness Gin Wing Fun in the case at bar, testified that he saw the appellant in China in August, 1937 and again in April, 1938 when the appellant was about 12 or 13 years of age [p. 11, Immigration board hearing of July 9, 1940].

IV.

The Appellant Having Satisfied His Burden of Proof by Establishing With Evidence to a Reasonable Certainty That He Was the Son of Gin Ting, the Board of Special Inquiry Was Arbitrary and Unfair in Excluding Him Without Some Substantial Evidence to the Contrary.

The American citizenship of appellant's alleged father Gin Ting was conceded by the board of special inquiry. His trip to China making possible his claim of paternity to the appellant was a matter of official record, San Francisco Immigration File No. 25882/4-4, showing that he departed from the United States on August 22, 1925 and returned from China on May 15th, 1938 when he reported to the Immigration Authorities that he had a son by the appellant's name was born to him and his wife on this trip. Thereafter, on each and every occasion of his several appearances before the Immigration Authorities at San Francisco, San Diego, Tucson and San Pedro, he reiterated the existence of a son by the appellant's name and age. This Honorable Court in *Louie Poy Hok v. Nagle*, 48 Fed. (2d) 753, 755, said:

“A similar case arose in *Ng Yuk Ming v. Tillinghast*, 28 Fed. (2d) 547, 549 (C.C.A. 1st). There, ‘13 years before * * * the alleged father * * * testified before the immigration authorities that he has a son bearing the name of the applicant, * * * which he confirmed on every other occasion upon which he was called to testify.’ The decision of the Court was that the decision of the immigration officials was not supported by the evidence and the prisoner was ordered released from custody. See, also, *Gung You v. Nagle*, 34 Fed. (2d) 848 (C.C.A. 9th). In the instant case the cumulative effect of the repeated

assertions by the father and the previously entered alleged brothers that there was a third son, Louie Fung Leung, born October 1, 1909, certainly go farther than a mere indication that the three were suffering from a delusion; the effect of the testimony in the mind of any reasonable man must be to create the belief that there was a third son somewhere in the offing." (Emphasis ours.)

Other cases holding the same view are: *U. S. ex rel. Lee Kin Toy v. Day*, 45 Fed. (2d) 206; *Johnson v. Ng Ling Fong*, 17 Fed. (2d) 11, 12; *U. S. ex rel. Leong Ding v. Brough*, 22 Fed. (2d) 926, 927; and *U. S. ex rel. Ng Gon Yuen v. Reimer*, 20 Fed. Supp. 976, 977.

The appellant and his father were given a most searching examination by the board of special inquiry at San Pedro. Appellant testified that his name was Gin Soon Ging; that he was born on May 25, 1926 in the Fung Wah Village, Gon Ung Bow section, Hoy-shan district in China; that he had resided in that Chinese village continuously since his birth up to the time of departure for the United States on this trip; that he was destined to his father, Gin Yan Oy, in Los Angeles; that his father's name was Gin Tan (Ting) and Gin Yan Oy was his father's marriage name; that his father was about 60 years of age and a cook by occupation; that his father was married only once, and that was to his mother, Lee Shee; that his mother Lee Shee was 56 years old and her birthday came on the 20th day of the 1st month each year; that his mother was a native of the Nom village, Hoy-shan district in China; that there were three boys in his family including himself; that the oldest boy in the family was Gin Hung Goon, who was about 30 years old and married

to Wong Shee from the Ngor May village in 1933, and they had one son named Gin Thloon Jon born in 1935; that he, the applicant, was the second child in the family; that his younger brother Gin Soon Pang, who was born to his parents in 1927, constituted the third member of his family; that his oldest brother Gin Hung Goon had made two attempts to gain admission into the United States, first time in 1931 and 1937, without any success; that his paternal grandfather was Gin San, or Gin Yat Gim by his marriage name, who died long ago and was buried in the Gai Gung How hill located about a third of a mile north of his home village; that his mother told him his grandfather was married twice—first to Fong Shee of Ung Nan village and after her death to another woman from the same clan and that his father was the son of his grandfather's first wife; that his grandmother and step-grandmother were buried with his grandfather in the aforesaid hill; that as these people died before his birth, he had never seen any of them; that his father had no brothers or sisters; and that his mother was the only child in her family. So much intimate knowledge of the family history the appellant had readily displayed and his alleged father under cross-examination corroborated the same in practically every detail.

As to his native village in China, the appellant testified that he lived in the 4th house on the 2nd row from the head of the Fung Wah village in China all his life up to May 10, 1940 when he left home for the United States; that the Fung Wah village consisted of 12 dwellings, 12 toilets or outhouses, and one school building; that the school-house is on the first row and there were three other rows of houses, each row thereof having four dwellings; that the houses on each row all adjoin each other; that

there was a fishpond in front of the village; that the villagers got their drinking water from a well located at the tail-end of the village close to the fishpond; and that the bamboo hedges at the rear and the two sides and the fishpond in front acted as protective barriers to the village. He made a diagram of the village for the enlightenment of the members of the board of special inquiry and the same was marked Exhibit "B" in the record.

With reference to his ancestral home, the house in which he was born and lived up to the present time, he described as follows:

"It is a one story green brick house consisting of two bedrooms; two kitchens and one parlor. It has a tile roof and cement floor. There are two outside windows in each bedroom, one above and one below the loft and there are two inside windows between the bedrooms and the parlor. There is one skylight in each bedroom protected by glass and each bedroom has a cross-loft. There is a shrine loft in the parlor, there are two outside entrances, entering into the kitchens."

He further testified that his oldest brother, Gin Hung Goon's family shared this house with them; that his brother Goon occupied the big door side bedroom with his wife and son, while the appellant and his mother and youngest brother Pang slept in the small door side bedroom. His description of the home was used in the cross-examination of his alleged father and no discrepancies thereon could be developed. There could be no question that they shared a very thorough knowledge of the family residence in China.

As to out of ordinary events, the appellant testified that in CR 27 (1938) some bandits attacked his village and kidnapped his mother and oldest brother Gin Hung Goon and that they were later released only upon payment of a ransom. He also told about the unexpected visits by an old friend of his father's by the name of Gin Wing Fun from the United States in 1937 and 1938 bringing money as well as tidings of his father's good health across the ocean. Gin Wing Fun appeared before the board to verify this and identified the appellant as the boy whom his friend and clansman Gin Ting requested him to see when he got to China. Appellee in the court below sought to discredit this testimony because this matter was not contained in a certain questionnaire signed by this witness aboard the incoming steamer upon his return to this country at Seattle in June, 1938. The appellee should be quite familiar with the hasty methods used in filling these form reports when everything is done under pressure and time is very limited for checking and discharging passengers. In the case of *Chan Cheung*, Immigration Bureau No. 55702/44, Inspector Roy M. Porter of Seattle, a man of years of experience in such work, frankly admitted as follows:

“However, it is known by all experienced officers that the statements taken from incoming Chinese on board the steamers are practically worthless so far as the real truth is concerned, as the *examining officers are hurried in their work and the Chinese persons examined have not the time necessary to think and recall when subjected to such questions in a hurried way. It is well known that nearly every Chinese who departs from the United States takes some letter or money from some friend in the United States to his family in China.*” (Emphasis ours.)

Therefore, it was not without reason for the court to hold in the case of *Flynn v. Tillinghast*, 32 Fed. (2d) 359, that *such alleged answers to a "stock omnibus question" form is a "very slight and insufficient ground on which to adjudge testimony unreliable."*

In reviewing the evidence, there was ample direct and material testimony in support of the relationship claimed by the appellant to his alleged father Gin Ting on the one hand, and not a scintilla of evidence to support the findings of the board of special inquiry to the contrary or to the effect that the appellant was a grandson instead of a son of Gin Ting on the other. Administrative tribunals may ascertain facts in any reasonable and fair manner they see fit, but they cannot reject sworn, consistent and unimpeached testimony without some real reasons which a fair-minded person would regard as adequate; *Ward v. Flynn ex rel. Yee Gim Lung*, 74 Fed. (2d) 145. The burden of proof was so satisfactorily met by the appellant that the board could not cite one material discrepancy between the testimony of the appellant and his father in the hearing. Our courts have repeatedly held that there must be at least some substantial evidence to support an excluding decision; *Nagle v. Wong Ngook Hong* (C.C.A. 9th), 27 Fed. (2d) 650; *Johnson v. Leung Fook Yung*, 16 Fed. (2d) 65; *Johnson v. Ng Ling Fong*, 17 Fed. (2d) 11; and *Leong Ding v. Brough*, 22 Fed. (2d) 926.

Our courts had long ago repudiated the theory that the Immigration Authorities have the power to reject the testimony of any number of apparently credible witnesses

and decide against them in favor of a presumption that an applicant is not an American citizen, but on the contrary, have time and time again restated the rule that *the testimony of one credible witness is sufficient in law to overcome that presumption*; *Gung You v. Nagle* (C.C.A. 9th), 34 Fed. (2d) 848, 852.

Conclusion.

This case certainly falls under the principle laid down by our Supreme Court in *Tisi v. Todd*, 264 U. S. 131, 44 S. Ct. 260, 63 L. Ed. 590, that the error of an administrative tribunal may be so flagrant as to render the hearing unfair. The uncontradicted evidence established conclusively the relationship of father and son between Gin Ting and the appellant and it was a manifest abuse of power and discretion for the Immigration Authorities to disregard the same without some substantial reason other than the questionable information contained in the anonymous communication. *Go Lun v. Nagle* (C.C.A. 9th), 22 Fed. (2d) 246; *Hom Chung v. Nagle* (C.C.A. 9th), 41 Fed. (2d) 126; *Nagle v. Jin Suey* (C.C.A. 9th), 41 Fed. (2d) 522; and *Gung You v. Nagle* (C.C.A. 9th), 34 Fed. (2d) 848.

It is well-settled that, when a claim of citizenship, which is more than colorable, is denied, the courts will scrutinize the administrative proceedings with great care to the end that American citizens shall not be unjustly deprived of

their citizenship; *Wong Hai Sing v. Nagle* (C.C.A. 9th), 47 Fed. (2d) 1021, 1024; *Woon Sun Seung v. Proctor* (C.C.A. 9th), 99 Fed. (2d) 285. Let us not forget our Supreme Court's admonition in *Kwock Jan Fat v. White*, 252 U. S. 454, 40 S. Ct. 566, 64 L. Ed. 1010, that:

“It is better that many Chinese immigrants should be improperly admitted than one natural born citizen of the United States should be permanently excluded from his country.”

It is therefore respectfully requested that the order of the court below in dismissing the writ be *reversed* with direction to discharge the appellant from the illegal custody of the Immigration Authorities.

Dated at Los Angeles, California, June 23rd, 1941.

Respectfully submitted,

YOU CHUNG HONG,
Attorney for Appellant.